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No. 627

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

THE GREAT ATLANTIC & PACIFIC TEA COMPANY, INC., *Petitioner,*

v.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

THOMAS R. MULROY
DANIEL WALKER

Attorneys for Petitioner,
The Great Atlantic & Pacific Tea Company, Inc.

Of Counsel:

HOPKINS, SUTTER, OWEN, MULROY, WENTZ & DAVIS
One North La Salle Street
Chicago, Illinois 60602

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Petitioner, The Great Atlantic & Pacific Tea Company, Inc. (herein called "A & P"), petitions for a writ of certiorari to review the judgment of the Court of Appeals for the Seventh Circuit entered in the above cause on June 25, 1964.

The opinion of the Court of Appeals is reported at 333 F.2d 705; the opinion of the district court appears at 224 F.Supp. 903. For the Court's convenience, the decision of the Court of Appeals is reproduced in the Appendix to this petition. The jurisdiction of this Court is invoked under Section 1254(1) of the Judicial Code (28 U.S.C. § 1254(1)).

FEDERAL STATUTE INVOLVED

The only federal statute involved in this case is Section 20(11) of the Interstate Commerce Act, sometimes referred to as the Carmack or Cummins Amendment, which provides in relevant part as follows with respect to the "liability of initial and delivering carrier for loss":

> "(11) * * * [A]ny such common carrier, railroad, or transportation company so receiving property for transportation * * * or any common carrier, railroad, or transportation company delivering said property * * * shall be liable to the lawful holder of * * * [the] bill of lading * * * for the full actual loss, damage, or injury to such property caused by it * * * notwithstanding any limitation of liability or limitation of the amount of recovery or representation or agreement as to value in any such receipt or bill of lading, or in any contract, rule, regulation, or in any tariff filed with the Interstate Commerce Commission; * * *." (49 U.S.C. § 20(11))

QUESTION PRESENTED

The precise question presented is this: What shall be the measure of damages for retail food supermarkets when an interstate carrier is admittedly guilty of unexcused and unreasonable delay in the delivery of a carload of perishables? The question appears mundane—until these factors are realized:

> 1. The Carmack Amendment to the Interstate Commerce Act (49 U.S.C. § 20(11)) provides that common carriers shall be liable for the "full actual loss, damage or injury" resulting from the carriers' fault. Here, there is absolutely no standard by

which the "actual loss" resulting from the carriers' delayed delivery can be measured with certitude.

2. The real impact on A & P's operations from carrier delays is the absence of the perishables which were ordered to satisfy consumer demand on a particular day. Problems resulting from commingling, the mass of products which must be handled by a retail supermarket, the tight store delivery schedule, the necessity of a rapid turnover of perishables and the cost of recording movement and sale of all perishable items prevent the keeping of records which would permit precise ascertainment of the impact of delayed delivery on the supermarket operation.

3. It is well known that all supermarket chains go to great lengths to establish a reputation for maintaining daily supplies of fresh perishables for the housewife. A & P—like other supermarket chains—has established a complex and carefully timed system for the daily delivery of fresh perishables to its retail stores. A & P's perishable delivery system requires advance orders sent to the producing areas by personnel experienced in computing the daily needs of the retail stores for carloads of perishables. The produce is delivered on a daily basis to each city and then transshipped by truck each night to the individual stores for sale on the following day. The failure of a carload of perishables to arrive on schedule disrupts this system and results in the lack of a sufficient quantity of perishables to satisfy the needs of the stores and consumers. This injury to A & P's operation is the realistic "fact of damage" in this case.

4. Damages for unreasonable delay cannot be computed in this case on the basis of the effect of the delay on the realizable price of the goods in the shipper's market, because supermarkets do not and cannot keep records showing the prices at which perishable items are sold at retail. The cost of keeping such detailed and massive records would be prohibitive for supermarket operators (all of whom are affected by the Seventh Circuit decision) because they must of necessity operate on a profit margin of a fraction of a cent on sales of produce items.

5. The carrier contends that to use the common law market value rule (decline in wholesale market value during the period of delay, ascertained from public market quotations—a rule of convenience and necessity adopted by the courts to avoid the complex and burdensome problems of proof presented by these cases) is unrealistic and improper because supermarkets do not buy and sell at wholesale; they buy from the grower and sell to the consumer.

6. Since A & P cannot measure its actual loss, the choice is between wholesale market price decline or retail market price decline. If the former cannot be used—as the lower courts have held—the result is no recovery since retail price data is not available. Involved here is a collision between the classic common law doctrines of *injuria absque damno* (injury without damage) and *ubi jus, ibi remedium* (every wrong has a remedy). In similar vein, this case presents the necessity of reconciling the demand of the Carmack Amendment that damages must measure "actual loss"

with the command of this Court in a series of key decisions that a way shall be found to compensate the victim so that the wrongdoer does not benefit from his own illegal acts.

7. This Court in 1893 and two courts of appeal in 1954 and 1957 have held that the intended disposition of goods by the shipper does not affect the right to recover damages based on the traditional common law wholesale market value rule. The decision of the Court of Appeals here is directly contrary to the philosophy and holdings in those decisions.

The problem presented by this case is not easy of solution; it requires a difficult accommodation of traditional common law concepts of damages to modern day commercial practice. While there is only $740 at stake in this case, it is viewed not only by the parties but by all railroads and all supermarket operators as being a test case. Hinging on the outcome are delay claims totaling many millions of dollars; even now, thousands of delayed shipment claims in courts throughout the United States are pending the final decision in this case. The decision not only will have a direct impact on all supermarket operators but also can result in burdening the courts (federal and state) with complex and detailed proof by shippers of the actual effect of delayed delivery on the retail prices at which the commodities are sold.

In broad terms, the real question presented by this case is whether the current trend of damage law shall be ignored so as to permit interstate carriers to delay with impunity shipments of perishables to supermarkets throughout the United States simply because the courts are unable to fashion a practicable measure of damages.

STATEMENT OF THE CASE

The parties stipulated all the facts, including the ultimate fact of unreasonable and unexcused delay;* the only issue submitted for decision was the method to be followed in determining the damages sustained by A & P.

The Salient Facts

On June 2, 1956, a carload of plums was shipped via the Santa Fe from Redbanks, California to A & P at Harlem River, New York. It was A & P's intention to use the plums for resale at retail in the New York City Metropolitan Area, where A & P has 667 retail stores. (App. 39, 41, 43) The plums should have been delivered on Sunday, June 10; instead, they arrived on Tuesday, June 12. (App. 39)

The Santa Fe has stipulated that this period of delay was "unreasonable and unexcused." (App. 40)

A & P orders produce on the basis of daily need by the retail stores. (App. 41) After receipt from the carrier, the produce is customarily moved to the stores in time for sale on the next day.** (App. 41) It necessarily follows

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* The stipulation is embodied in the opinion of the Court of Appeals and therefore appears at page 39 of the Appendix to this petition.

** As stated in the stipulation (App. 45), there are occasional departures from this practice. It could hardly be otherwise in view of the size and complexity of A & P's operations. The dispositive facts are that 24-hour movement to the stores is the customary procedure and that this procedure was followed as to the plums here involved. (App. 41) However, even if occasionally there are incoming cars of perishables on sidings that can be used to meet an emergency resulting from delay, the mere fact that A & P must disrupt its regular system and divert trucks to unload perishables from these cars is a realistic "fact of damage" resulting from delayed delivery.

from these facts that when produce items such as the plums here involved are not delivered in timely fashion, A & P cannot satisfy the complete needs of at least some of its stores and, therefore, of its customers.

A & P does not store perishables for future use in either warehouses or retail stores. (App. 41) A & P relies on daily delivery of perishables by the carriers to meet the daily need in its stores; it has no inventory which can be drawn on to meet daily needs when an ordered and expected car of perishables does not arrive.

In this case, based on the facts set forth above, A & P ordered the plums on the basis of need during the 24 hours following scheduled delivery on June 10, 1956. If the plums had arrived on time, they would have been moved to the stores by A & P in time for sale at retail on Monday, June 11. Instead, the plums were not available to the stores until Wednesday, June 13. By this time, since produce is continually ordered on a 24-hour-need basis, other plums had obviously arrived.

The common sense result of the delay was, therefore, a scarcity of plums in some stores on Monday and a surplus in some stores on Wednesday.

It is stipulated that during the period of delay, the wholesale market price of plums of like grade, quality and quantity to those involved in the shipment declined in the total amount of $740. (App. 41)

As to retail prices of plums of like grade and quality, it is stipulated that A & P does not keep and has never kept records showing any facts about the sale of perishables—whether they were sold, where they were sold or the price at which they were sold. (App. 42)

A & P does issue suggested retail price lists to its store

managers but each of the managers (667 in the New York City Area) has "independent authority" to vary those prices. (App. 42)

Based on the stipulated facts, A & P has consistently argued that not only is it impossible to determine actual retail prices in this case, but that it would be impracticable to do so in the future. To satisfy its needs for produce (ordered on the basis of experience and expertise, as already noted, on a 24-hour-need basis), A & P shipped by carrier 70,702 cars of produce in 1956 and 13,885 of these were delivered in the New York City Area. (App. 44)

In 1956, A & P filed claims for delayed delivery on 2,491 cars of produce. (App. 44) Tracing the perishables in these delayed shipments through to resale at retail would involve recording the handling and sale of the hundreds of thousands of produce items contained in each of these 2,491 cars.

The magnitude of this tracing task is self-evident from the fact that one freight car contains 218,236 plums. (App. 44)

These detailed facts support the following conclusions:

1. The Santa Fe is admittedly responsible for unreasonable delay in delivering plums to A & P which were needed in the retail stores on June 11, 1956.

2. As a result of the carrier's wrong in unreasonably delaying the plums, A & P had on June 11, 1956 in some of its 667 retail stores in the New York City Area fewer plums than were needed in these stores and on June 13 it had a surplus of plums beyond its needs in some stores.

3. The impact on A & P's operations of the scarcity of plums on June 11 and the surplus on June 13 cannot be precisely measured in dollars and cents, but there has clearly been a disruption of A & P's business.

4. Wholesale market value decline during the period of delayed delivery is simple and convenient to ascertain. An objective source, beyond the control of carrier or shipper and reflecting actual transactions, is available for determining prices. It is realistic here as in other situations where it has traditionally been applied; it measures the cost of replacing the goods which the shipper does not have when he needs them, less the amount that could be received in mitigation of damages when the delayed goods arrive.

5. The *suggested* retail price lists are not an appropriate source to determine either fact or amount of damage resulting from the delayed delivery. The lists do not reflect *actual* retail prices and are not reliable indicia for future use in determining damages since A & P could, if it desired, simply alter the suggested prices when it knew there was a delay and thereby determine its own damages.

6. It would be prohibitively burdensome and expensive for A & P or any other supermarket organization to establish actual retail prices by keeping records of all retail sales of all the items of produce shipped in delayed cars. It would be wholly impracticable for any supermarket organization, to trace a carload of plums (containing 218,236 plums) to their ultimate sale at retail in some or all of its retail stores.

7. It is *impossible* in this case (because no records were kept) to ascertain either the prices at which the plums would have been sold at retail had they been delivered in timely fashion or the prices at which they were sold after actual delivery.

The Opinions Below

The district court found—erroneously, in view of the stipulated fact that the retail price lists on which it relied contained only suggested prices—that A & P sold the delayed produce for the "identical" price on Wednesday that it would have received if the produce had been delivered on time and therefore been in the stores on Monday. (224 F.Supp. at 905) The district court, relying primarily on this key finding, held that resort to wholesale prices was improper and that A & P would have to prove an actual decline in retail prices during the period of delay in order to receive damages. (224 F.Supp. at 905)

The Court of Appeals took a different tack. It refused to rule on the propriety of any measure of damages but held that A & P could not recover because it failed to prove that it had suffered any damage:

> "We do not reach this contention, however [A & P's argument that it was the Santa Fe's burden to prove that any method other than the normal wholesale market decline rule would more closely compute actual damage], since it is our view that A & P has failed to sustain its burden of proving that it suffered actual damage due to the delay in delivery * * *. Unexcused and unreasonable delay in shipment does not establish, *ipso facto,* actual damage. In the absence of a showing of, *e.g.,* decline in retail price, physical damage or deterioration, or sale at a reduced price on a 'quick-sale'

> counter due to delay and anticipated spoilage we fail to see how A & P has established actual damage." (App. 36)

Based on this reasoning, the Court of Appeals concluded that A & P could recover no damages. The court ignored the fact that this case involves delay which interfered with the scheduled daily delivery of perishables to satisfy store needs in accordance with a system planned on the basis of experience and expertise. The delay here was not injurious because it resulted in physical damage, deterioration or anticipated spoilage of the perishables (the only types of damage which the Court of Appeals could conceive); the "fact of damage" arises from the impact of the delay on the operation of A & P's carefully planned perishable delivery schedule. Because this type of injury is more difficult to grasp than the types envisaged by the Court of Appeals does not make it any less real.

The result of the decision of the Court of Appeals is that carriers can with impunity unreasonably delay shipments of perishables to supermarkets throughout the United States and with no fear of liability repeatedly upset the carefully planned systems established by supermarkets to insure that consumers will have available daily supplies of fresh perishables.

No supermarket can afford to keep records which would trace the flow of perishables and establish prices at which they are sold to the consumer so as to meet the unreasonable standard of damage proof established by the Court of Appeals.

REASONS FOR GRANTING THE WRIT

THE NECESSITY OF RESOLVING AN IMPORTANT FEDERAL QUESTION

The Carmack Amendment to the Interstate Commerce Act (49 U.S.C. § 20(11)) directs that a common carrier "shall be liable to the lawful holder of [the bill of lading] for the full actual loss, damage or injury" caused by the carrier. The legislative history makes it clear that the amendment was intended to broaden, not narrow, carrier liability. See *New York, P. & N. R.R. Co.* v. *Peninsula Produce Exchange,* 240 U.S. 34 (1916). In that case, this Court also held that the statute covered damages resulting from unreasonable delay as well as to physical loss or injury.

The Necessity of Reconciling the Carmack Amendment with the Decisions of This Court

The question presented by this case is whether the words "full actual loss," intended to preclude carriers from limiting their liability, shall be used to *deny* damages to a shipper simply because he cannot measure in dollars the "actual" loss resulting from the admitted unreasonable delay. To give the words "actual loss" this technical, literal meaning is not only contrary to the legislative intent of the Carmack Amendment but also subverts the command of a series of Supreme Court decisions that the federal courts must find a practicable way to compensate the plaintiff where liability is clear. See *Bigelow* v. *RKO Radio Pictures* 327 U.S. 251, 265 (1946); *Story Parchment Co.* v. *Paterson Co.,* 282 U.S. 555, 561-564 (1931); and *Eastman Kodak Co.* v. *Southern Photo Co.,* 273 U.S. 359, 377-379 (1927).

In *Bigelow*, this Court said:

> "The most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created. • • • 'The constant tendency of the courts is to find some way in which damages can be awarded where a wrong has been done.'" (327 U.S. at 265)

The Actual Fact of Damage Proved by A & P

Uncertainty of the amount of damages is precisely the problem in this case just as it was in *Bigelow*. A & P ordered a carload of plums to meet consumer demand on Monday; it did not receive the plums until Wednesday, when it also received the regular shipments ordered for that day. A & P maintains no inventory of plums—to meet store demands, it relies on daily deliveries, ordered from the producing area by experts on the basis of experience with store needs. Obviously A & P's complex and delicately timed supply system for the daily delivery of perishables was disrupted by the admittedly unreasonable delay, but who can measure the "actual loss"?

Who can tell how many less plums were sold on Monday because this carload was not available? Who can tell whether all the plums that arrived on Wednesday were sold in 667 retail stores? Who can tell how many customers may have been unable to buy plums from A & P on Monday because the store supply was deficient? No one knows what the plums would have been sold for on Monday if they had arrived on time; no one knows what they were sold for on Wednesday—or even whether they were in fact sold on that day or any other day. The "actual loss" to A & P resulting from this disruption of its business simply cannot be proved.

But to deny that A & P suffered any damage to its business, to say that there is no proven "fact of damage," is to ignore the realities of the complex perishable distribution system established by A & P to satisfy the demand of the modern housewife for fresh produce.

The Failure of the Courts Below To Come to Grips With the Real Problem

Strangely, while the Court of Appeals quoted the language from A & P's brief setting forth the interference with A & P's carefully timed perishable delivery system caused by the carrier's delay, it gave no answer to this statement of commercially realistic business injury. Relying on the language of the Carmack Amendment as to actual loss, the court simply concluded that A & P must go without remedy because it failed to prove decline in retail price, physical damage or deterioration of the plums—as though these were the only ways in which "fact of damage" could be established. (App. 36)

The basic problem here is how to reconcile the "actual loss" language of the Carmack Amendment with the direction of *Bigelow* that the courts must "find some way in which damages can be awarded where a wrong has been done." (327 U.S. at 265) The district court completely failed to come to grips with this problem; it was apparently mesmerized by the seemingly unusual claim of a shipper that it should receive damages for delay measured by wholesale market decline when the shipper neither bought nor sold on that market.

The Court of Appeals did take a few first steps. It correctly recognized that actual purchase or sale by the shipper at wholesale is not necessary; that the basis for the traditional market value rule for measuring damages "is that

the shipper *has an opportunity* to purchase at the market price on the contracted arrival date to fulfill contracts and *can sell* the delayed or damaged goods at the market price on the date of their arrival in order to mitigate its damages." (App. 32; emphasis added)

The court also conceded that this is "the general common law rule of damages in cases of unreasonable delay." Finally, the court cited *Bigelow* and quoted the doctrine that "the wrongdoer shall bear the risk of the uncertainty which his own wrong has created." (App. 31, 32)

But the Court of Appeals made no effort to reconcile these doctrines with the Carmack Amendment; *it failed to recognize that the Carmack Amendment was intended to broaden rather than limit carrier liability.* It simply held that, despite the *Bigelow* doctrine and the traditional common law rule, the "actual loss" provision of the Carmack Amendment precluded recovery of *any* damages by *any* measure simply because A & P did not prove retail price decline, physical damage or deterioration.

The Adverse Effects of the Seventh Circuit's Decision on Other Cases

This Court should, we respectfully submit, solve the knotty problem which the courts below would not resolve. Its resolution will have effects going far beyond this case:

1. Thousands of cases by A & P against the carriers are pending in the federal and state courts awaiting the outcome of this test case (5,769 separate claims for delayed delivery filed by A & P are pending in the Circuit Court of Illinois alone under stipulations between A & P and the carriers which turn on the decision in this case). If, following the

traditional market value rule based on convenience, necessity and (from the standpoint of replacement value) commercial reality, this Court should decide that wholesale market price decline during delay is the correct measure of damages, all of these cases could be disposed of expeditiously.

2. Every large supermarket organization in the United States has the same problem as A & P. Each will have the same Hobson's choice—allow all carriers to delay perishables with impunity or institute a prohibitively costly record system to establish the actual impact of delayed delivery on retail prices. Even if an attempt should be made to do the latter, the courts would be burdened with a multitude of cases involving proof of actual resale prices of hundreds of thousands of items of produce.*

3. If the Court of Appeals decision is allowed to stand, private litigants in other cases will be confronted with a precedent which states that the concept of fact of damage is equivalent to amount of damage—if the plaintiff cannot prove that the wrong resulted in a measurable injury, he has no legal remedy. This is the true impact of the Seventh Circuit decision which held that A & P could not recover because it failed to show any actual loss. Actual loss was then equated by the court to damages which are immediately susceptible of measurement: Decline in retail price and physical damage or deterioration.

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* It is no answer to say that the "suggested" retail price lists can be used for this purpose. Prepared by the supermarket in advance of actual sale, these prices could easily be adjusted by the supermarket organization to show a retail price "decline" whenever a delay occurs, thereby permitting the supermarket to artificially determine its own damage.

It is the hope of A & P that the Supreme Court will perceive the difficult damage concepts underlying the issues in this case and accept the challenge to provide a solution which, unlike those of the lower courts, will not only enable expeditious disposition of the thousands of cases awaiting the outcome of this case, but will not impede the application of the rule that wrongdoers such as the Santa Fe should not be permitted to escape liability merely because the plaintiff has difficulty in establishing a precise measurement of the way in which he has been injured.

THE DECISION OF THE SEVENTH CIRCUIT CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER CIRCUITS

Departure From the Doctrine of the Estill Case

The key to this case lies in the failure of the district court and the Court of Appeals to adhere to the principles established by this Court in *New York, Lake Erie & Western R.R. Co.* v. *Estill*, 147 U.S. 591 (1893), which allowed the shipper to sue and recover for injuries to cattle caused by the carrier. Some of the cattle were intended for resale; some were to be kept for breeding purposes. Despite this, the Supreme Court upheld the traditional common law rule measuring damages by resort to market value:

> "It was not material whether the plaintiffs intended to keep the cattle upon their farms, for breeding purposes, or to sell them upon the market. The depreciation in value of the cattle was the same in either case.
>
> • • •
>
> "There is no ground for applying a special rule to this case, or for holding that the plaintiffs

ought to have traced each animal and to have shown the amount received for it when sold.

• • •

"The plaintiffs may have received on the sale of the cattle more or less than their market value. The defendant might have brought out evidence as to what the animals were sold for by the plaintiffs, to contradict the evidence as to their market value; but the plaintiffs could not bind the defendant by the prices for which the animals were sold. The impracticability of adopting such a rule as is insisted upon by the defendant is pointed out in the opinions rendered on the motion for a new trial. Many of the cows were kept for months after their arrival in Missouri. Some of them were traded for ponies, and the ponies were sold at a loss. Others were sold with a warranty that they would become breeders, and were afterwards taken back by the plaintiffs. Some were shipped from point to point in the West and sold. *The suggested rule was, therefore, impracticable of application.*" (147 U.S. at 617-619; emphasis added)

The *Estill* case points up two principles. First, the plaintiff cannot "bind the defendant by the prices" at which the goods are sold. Second, a rule requiring the tracing of goods through to resale would be "impracticable of application."

These principles of the *Estill* case are directly applicable to A & P. It would be infinitely more impracticable for A & P to trace hundreds of thousands of individual items of produce and show the amount received for them when sold than it would have been to trace the cattle in *Estill*.

And it is no answer to the necessity of applying the principles of *Estill* to this case to say that the cattle there were actually damaged whereas the perishables here were not. The concepts of fact of damage necessarily vary with the case—the injury to the cattle was no more real to the shipper in *Estill* than the injury to A & P's delicate perishable operation caused by the delay in this case.

Application of the concept of "realism" of the type adhered to by the courts below (one who sells on the retail market cannot recover damages based on the wholesale market) would have defeated the shipper in *Estill* who had no intention of selling all the cattle on the market used to measure damages. But the Supreme Court there recognized the basic concept that should control this case—the standard used to measure the amount of damages need not be the same as that used to determine whether "fact of damage" has been established.

The inability to use the horses as planned was the injury in *Estill*; the market value of the horses (whether or not they were to be sold on that market) was the appropriate *measure* of damages.

Departure From Traditional Concepts of Damages Creates a Dangerous Precedent

It is the preoccupation of the courts below with realism as a touchstone of damages (A & P is a retailer, so damages must be measured by retail price decline) that has led to their departure from basic principles of damages and created a troublesome precedent. The problem is colorfully illustrated by *The Mediana*, L.R. (1900) App. Cas. 113, 117, where the House of Lords had before it the problem of

measuring damages for the loss of the service of a damaged lightship:

> "Now, in the particular case before us, apart from a circumstance which I will refer to immediately, the broad proposition seems to me to be that by a wrongful act of the defendants the plaintiffs were deprived of their vessel. When I say deprived of their vessel, I will not use the phrase, 'the use of the vessel.' *What right has wrong-doer to consider what use you are to make of your vessel?* More than one case has been put to illustrate this: for example, the owner of a horse, or of a chair. Supposing a person took away a chair out of my room and kept it for 12 months, could anybody say you had a right to diminish the damages by showing that I did not usually sit in that chair, or that there were plenty of other chairs in the room? The proposition so nakedly stated appears to me to be absurd." (Emphasis added)

The Lord Chancellor then goes on to explain the nub of the common sense rule that plaintiffs from the beginning of common law up to A & P in the case at bar have relied on:

> "I know very well that as a matter of common sense what an arbitrator or a jury very often do is to take a perfectly artificial hypothesis and say, 'Well, if you wanted to hire a chair, what would you have to give for it for the period'; and in that way they come to a rough sort of conclusion as to what damages ought to be paid for the unjust and unlawful withdrawal of it from the owner. *Here, as I say, the broad principle seems to me to be quite independent of the particular use the plaintiffs were going to make of the thing that was taken.*" (Emphasis added)

Obviously, the owner of the chair suffered no out-of-pocket loss—but the Lord Chancellor would give him rental value of the chair, just as here the Lord Chancellor would give A & P "replacement value"—the cost of buying plums to replace those needed, but not available, less the price realizable for the plums when they did arrive, in mitigation of damages.

The Seventh Circuit would have held in The Mediana, under its philosophy as expressed in this case, that the owner of the chair could recover nothing because he failed to prove any actual loss (he could have sat in another chair; A & P could have obtained elsewhere the plums it needed for its retail stores).

In similar vein to *The Mediana,* Professor McCormick criticizes undue emphasis upon technical accuracy in measuring general damages:

> "If a railroad engine has set sparks to a farmer's hayrack and destroyed the hay, the value of the hay when destroyed may afterwards seem too much or too little to measure the financial benefit he would have had from the hay itself—an attempt which is little better than guesswork at best. Too much, for it may appear with certainty that, even if it had not been burned, the farmer would have left the hay in the field where it would have been destroyed anyway by a flood which came a few days after the fire. Or again, it may certainly appear that the farmer would have stored the hay in his barn until the next spring, and that then hay was worth only one-half the market value at the time of the fire. Too little, for it may be clear that the farmer would have held the hay if it had not burned, and would have sold it during a year of scarcity when hay became worth twice the former value.

> *"It is reasonably well established that, as against the wrongdoer, the law is willing to disregard the possibility that an award of market value at the time of the wrong may be too much.* Such an award is the normal measure of damages, both in contract and tort cases, and will be allowed despite the fact that the property would have later been damaged or destroyed from other causes, or the fact that it would have depreciated in market value in the owner's hands—rough justice, but a convenient and reasonable standard, which the courts are not inclined to refine and complicate at the wrongdoer's instance." (McCormick, Damages (1935) § 48, pp. 184-185; emphasis added)

This doctrine—resort to a "convenient and reasonable standard"—was the philosophy of this Court in the *Estill* case; it is the departure of the Seventh Circuit from this doctrine which creates the problem here.

Conflict With the Second and Fifth Circuits

The decision by the Court of Appeals is also contrary to *Reider* v. *Thompson,* 197 F.2d 158 (5th Cir. 1952). The case involved damage to sheepskins and wool while being transported from New Orleans to Boston. The sheepskins were later sold and the trial court held for the carrier because plaintiff had failed to prove his damages by establishing the amount he received upon the sale of the sheepskins (just as A & P here failed to prove the actual resale price of the delayed plums). The Court of Appeals in the *Reider* case reversed on the ground that the plaintiff had, through the opinion testimony of an expert, made out a *prima facie*

case of the market value of the sheepskins had they been delivered in good condition as contrasted with their market value in the inferior condition in which they were actually received. The court went on to say:

> "If there were circumstances existing which showed that the general rule of damages binding upon the plaintiff was not proper here because its application would result in awarding the plaintiff more than indemnity, these should have been developed and disclosed as a matter of defense." (197 F.2d at 161)

Thus, the Fifth Circuit clearly imposed on the carrier the burden of establishing "that the general rule of damages [the market value rule] binding upon the plaintiff was not proper here because its application would result in awarding the plaintiff more than indemnity."

Here, the Seventh Circuit reversed the burden. It said: "The burden of proving that the plums were sold at a different retail price on Wednesday than they could have been sold for on Monday was on A & P." (App. 37)

The only proof offered by the Santa Fe that could conceivably be directed at satisfying its burden of proof is the *suggested* retail price lists distributed by A & P to the 667 retail stores in the New York City Area. (App. 42) But, as the parties have stipulated (App. 42), each store manager is free to vary these prices at will. The lists are not, therefore, proof of actual retail prices and the Santa Fe has not discharged its burden of establishing that A & P sold the delayed plums on Wednesday for the same price it would have received if they had been timely delivered for sale on Monday.

Further, these suggested retail price lists are totally unsatisfactory as a reliable measure of damages. They are prepared and issued daily by A & P. We can hear now the outraged reaction of the carriers if A & P used these lists, subject to its whim, to set the prices which would control its own damages for delayed delivery.

There are two other courts of appeal decisions which are in conflict with the decision by the Seventh Circuit in this case. In *Fort Worth and Denver Ry. Co.* v. *United States*, 242 F.2d 702 (5th Cir. 1957), and *United States* v. *New York, New Haven & Hartford Ry. Co.*, 211 F.2d 404 (2d Cir. 1954), the courts permitted recovery of full market value in the case of products lost or damaged by the carrier, even though the products were to be given away by the Government in one case and sold at one-half market value in the other.

In neither of these cases did the courts require proof that the Government suffered any "actual damage"; there was no showing that the Government did not have ample stocks of the products involved (cottonseed and potatoes) so that the loss of these shipments had any effect on the federal programs involved.

In the *New Haven* case, the court stated that the market value rule "is the usual one under the [Carmack Amendment], and is not to be varied by special agreement of the parties or, we agree, by special circumstances of one of the parties." (211 F.2d at 404) Here, specifically because of the "special circumstances of one of the parties," the Seventh Circuit not only refused to apply the usual market value rule but denied *all* damages.

If the principle here adopted by the Seventh Circuit had been applied in the Second and Fifth Circuit decisions, the

Government's failure to prove that the loss of the products affected its programs plus the affirmative evidence that the products were to be disposed of at less than market value—given away in one case—would have prevented any recovery of damages by the plaintiff.

The decision by the Seventh Circuit here simply cannot be reconciled with the *Estill, Reider, Ft. Worth and Denver* and *New Haven* cases. The failure of the court to properly interpret and apply the controlling principles in the same fashion as the Second and Fifth Circuits has led not only to an erroneous result but one which will have, as earlier discussed, far-reaching impact on the thousands of cases awaiting the outcome of this test case as well as on many other cases where plaintiffs are confronted with the impossibility or impracticability of establishing a precise, measurable "actual loss."

CONCLUSION

The lower courts have failed to come to grips with the important federal question presented by this case. Only in this Court can A & P now hope to obtain resolution of a most troublesome problem of damages law. While this case may not have the surface glamour of others, it does present one of those rare issues which calls for a searching examination of the difficulties of applying traditional common law

concepts of damages to modern marketplace situations not contemplated when the original rules were adopted.

Respectfully submitted,

THOMAS R. MULROY
DANIEL WALKER

Attorneys for Petitioner,
The Great Atlantic & Pacific Tea Company, Inc.

Of Counsel:

HOPKINS, SUTTER, OWEN, MULROY, WENTZ & DAVIS
One North La Salle Street
Chicago, Illinois 60602

October 23, 1964

APPENDIX

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 14539. SEPTEMBER TERM, 1963 — APRIL SESSION, 1964

THE GREAT ATLANTIC & PACIFIC TEA COMPANY, INC.,
Plaintiff-Appellant,
v.
THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

June 25, 1964

Before HASTINGS, *Chief Judge*, and KNOCH and KILEY, *Circuit Judges.*

HASTINGS, *Chief Judge.* The Great Atlantic & Pacific Tea Company, Inc. (A & P) brought this action against The Atchison, Topeka and Santa Fe Railway Company (Santa Fe). It sought to recover damages alleged to have resulted from an unreasonable and unexcused delay of two days in a shipment of plums from California to New York.

The case was submitted to the district court for decision solely upon a stipulation of facts, briefs and oral argument of the parties. The evidence consisted of the stipulation of facts and the bill of lading for the shipment.

The trial court found that A & P suffered no compensable damage resulting from Santa Fe's unreasonable and unexcused delay of two days in delivering the shipment of plums and dismissed the action. The memorandum, findings of fact and conclusions of law filed by Chief Judge William J. Campbell of the Northern District of Illinois were reported at 224 F. Supp. 903 (January 6, 1964). From this judgment of dismissal, A & P has appealed.

A & P represents that it now has pending in the Municipal Court of Chicago [now the Circuit Court of Illinois] alone 5,769 separate claims against various carriers for delayed delivery of shipments and that there are a multitude of similar claims filed or to be filed in other courts. Although all such claims are not based on identical factual situations, it is said many of them are in a category similar to the case at bar. Both sides state this case is a test case for such claims. For this reason, we deem it advisable to set out the entire stipulation of facts as an Appendix to this opinion. Reference is now made thereto.

On June 2, 1956, A & P shipped a carload of plums from Red Bank, California consigned to itself at Harlem River, New York, one of its receiving stations for produce in the New York area. Santa Fe was the carrier and the shipment was made under a straight uniform bill of lading issued by Santa Fe and signed by both parties.

Under the usual and customary time for transportation and delivery of such a shipment, the plums should have been delivered to A & P prior to 9:00 A.M. on Sunday, June 10, 1956, ready for sale at retail in A & P stores in the New York City area on Monday, June 11, 1956. The plums were delivered to A & P by Santa Fe at 5:30 A.M. on June 12, 1956, two days late.

The two-day period of delay was unreasonable and unexcused but was not intentional.

The plums were sold at retail by A & P in its New York City outlets beginning on Wednesday, June 13, 1956. They were not sold at wholesale.

If the plums had been sold on the wholesale market in New York City on June 12, 1956, the average price per crate would have been 74 cents less than if such sale had been made on the wholesale market on June 11, 1956 (June 10, 1956 being Sunday). A & P neither bought nor sold any plums on the New York City wholesale market on any day during this critical period.

A & P purchased the plums with the intent of sale at retail on June 11, 1956. It issued to all of its retail stores in that metropolitan area a daily price list which set out a retail selling price for each item of produce for that day. The price shown for plums on such daily price list did not change during the period from June 10, 1956 to June 15, 1956. Each retail store manager had independent authority to lower the retail price of plums but not to increase the retail prices shown in the daily price list.

The daily price lists (and any advertisements) are the only records A & P keeps with reference to the actual retail price at which its produce is sold. The retail price of plums during June, 1956 did not change as frequently as the wholesale market prices and did not fluctuate in relation to changes in the wholesale market price. Although the latter is one of several factors used in determining retail prices.

A & P does not keep records which would disclose with respect to shipments of produce sold at retail (a) whether all of such produce has been sold, (b) the date or time of

day when such produce was sold, (c) the store at which such produce was sold, (d) whether such produce was commingled with other produce of the same kind or quality, or (e) any facts about the sale of such produce, including the price at which it was sold other than the daily price lists and advertisements, neither of which constitutes a record of actual sales.

There was no physical damage to or deterioration of the plums by reason of the delayed shipment.

A & P bases its claim for damages solely on delay in the transportation and delivery of the produce and the decline in wholesale market price during the period of such delay.

Under this measure of damages, A & P figures the difference between the cost of replacement on the wholesale market (as of June 11, 1956), reduced by the wholesale price at which the delayed goods could have been sold when delivered (June 12, 1956), this being the stipulated sum of 74 cents per crate. There were approximately 1,000 crates of plums in the carload shipment. A & P claims damage in the amount of $740.

Santa Fe is a "carrier" within the meaning of that word as used in the Interstate Commerce Act, as amended, and was the initial carrier as described in Section 20(11) of the Act, Title 49, U. S. C. A. § 20(11) for the shipment of the plums in question.

The plums were not transported and delivered to A & P with "reasonable dispatch" within the meaning of that term in Section (2) of the "Contract Terms and Conditions" of the uniform straight bill of lading.

A & P's theory of recovery based upon decline in wholesale market prices appears to be as follows: once A & P sustains its burden of proving that it has been injured by

an unreasonable and unexcused delay in shipment by Santa Fe, then the wholesale market decline rule is appropriate as a method of determining the amount of actual damage, even though the item delayed was sold at retail; the burden of proving that the wholesale market decline rule will result in unjust enrichment to A & P is on Santa Fe; and, Santa Fe failed to sustain this burden.

Applicable in resolving the issues of recovery and measure of damage is Interstate Commerce Act, 49 U. S. C. A. § 20(11) (sometimes referred to as the Carmack Amendment or the Cummins Amendment):

> "Liability of initial and delivering carrier for loss; limitation of liability; notice and filing of claim
>
> > "(11) • • • [A]ny such common carrier, railroad, or transportation company so receiving property for transportation • • • or any common carrier, railroad, or transportation company delivering said property • • • shall be liable to the lawful holder of • • • [the] bill of lading • • • for the *full actual loss, damage, or injury* to such property caused by it • • • notwithstanding any limitation of liability or limitation of the amount of recovery or representation or agreement as to value in any such receipt or bill of lading, or in any contract, rule, regulation, or in any tariff filed with the Interstate Commerce Commission; • • •" (Emphasis added.)

The general common law rule of damages in cases of unreasonable delay and damage to goods in shipment is the difference in the market value of the goods at the date and in the condition they were contracted to arrive at their

destination and the date on and the conditior in which they actually arrived. *New York &c. Railroad Co.* v. *Estill,* 147 U. S. 591, 616-617 (1893); *Mitsubishi Shoji Kaisha* v. *Davis,* S. D. N. Y., 291 Fed. 882, 884 (1922); aff'd (2d Cir.) 291 Fed. 57, cert. denied, 263 U. S. 706; *Sangamon and Morgan Railroad Co.* v. *Henry,* 14 Ill. 156, 157 (1852).

The theory which underlies the award of damages based upon market value rather than the shipper's resale contract price to third persons is that the shipper has an opportunity to purchase at the market price on the contracted arrival date to fulfill contracts and can sell the delayed or damaged goods at the market price on the date of their arrival in order to mitigate its damages. *Mitsubishi Shoji Kaisha* v. *Davis,* 291 Fed. at 884; *Czarnikow-Rionda Co.* v. *Federal Sugar Refining Co.,* 255 N. Y. 33, 173 N. E. 913, 915 (1930).

The market value rule has been applied in the absence of a purchase by the shipper at the market price on the contracted for arrival date to fulfill existing contracts. *Ibid.*

The measure of damages in delay and damaged goods cases is actual damages, and the market value rule has been adopted as a method to ascertain actual damages. Its adoption is due to its simplicity in application, the probability that it comes close to actual damages in most cases and the policy that "as against the wrongdoer, the law is willing to disregard the possibility that an award of market value at the time of the wrong may be too much." McCormick, Damages § 48, at 184 (1935). "[T]he wrongdoer shall bear the risk of the uncertainty which his own wrong has created." *Bigelow* v. *RKO Radio Pictures,* 327 U. S. 251, 265 (1946).

Since the market value rule is merely a method, it is not applied in cases where it is demonstrated that another rule

will better compute actual damages. It has been held that the burden of proving that the market value rule will not result in a just measure of actual damage is on the carrier. *Reider* v. *Thompson*, 5 Cir., 197 F. 2d 158, 160 (1952).

In *United States* v. *Palmer & Parker Co.*, 1 Cir., 61 F. 2d 455, 459 (1932), a suit for damages due to delay in shipment, the court stated:

> "We think the court below erred in applying the market value of logs to this case. There is only one rule, of universal application, in such cases, and that is to give compensation for the loss suffered. Frequently, this ideal is found impossible of complete attainment; perhaps generally the market value rule is found to be the nearest approach to reaching the actual loss. But the market value rule is inapplicable when, on the facts, it is not the nearest practicable approach to an ascertainment of the actual loss. Each case must be governed by its own facts."

The Carmack Amendment, *supra*, does not appear to have changed the common law rules discussed above.

The Illinois Supreme Court in *Wood & Co.* v. *Chicago, M. & St. P. Ry. Co.*, 320 Ill. 341, 343, 151 N. E. 229, 231 (1926) stated that, "The [Carmack] amendment does not establish a new measure of damages but simply prohibits the carrier from limiting its liability at common law, thereby leaving the measure of damages the same as it was at common law."

In *Fort Worth and Denver Railway Co.* v. *United States*, 5 Cir., 242 F. 2d 702, 705 (1957), the court said, "The amount of damages provided by § 20(11) [The Carmack Amendment] is the full actual loss, damage or injury to

such property at destination. * * * We are of the opinion that the rule of damage measurement by fair market value at destination should be followed here."

As at common law, the fair market value rule is not applied when actual damage can more nearly be ascertained by other means. The Supreme Court, in a case involving the Cummins Amendment, refused to apply the market value rule and stated, "The test of market value is at best but a convenient means of getting at the loss suffered. It may be discarded and other more accurate means resorted to if, for special reasons, it is not exact or otherwise not applicable." *Illinois Cent. R. Co.* v. *Crail,* 281 U. S. 57, 64-65 (1930).

A & P contends that upon application of the above rules it is entitled to recover damages based upon the market value (wholesale) at destination even though the plums were for retail sale, since Santa Fe failed to sustain its burden of proving that another rule would more closely compute actual damage.

We do not reach this contention, however, since it is our view that A & P has failed to sustain its burden of proving that it suffered actual damage due to the delay in delivery. While we express no opinion thereon, it is possible that the wholesale market price at destination could be appropriate as a method of ascertaining the actual damage to goods sold at retail, due to the difficulty in ascertaining retail prices. Yet, before the appropriateness of this method comes into issue, it is mandatory that the shipper prove that it has suffered actual damage due to delay in its sale at retail.

A & P has cited numerous cases in support of its argument that decline in wholesale market price should be used as a measure of damages. But, in every case cited, it was

shown that the shipper had suffered actual damage. *E.g.*, *McNeely & Price Co.* v. *Ellerman & Bucknall S. S. Co.*, E. D. Pa., 100 F. Supp. 339, 340 (1950) ("the damaged bales were examined by surveyors, and the damage found to be one-third of their value."); *Mitsubishi Shoji Kaisha* v. *Davis*, 291 Fed. at 885 (action for conversion by carrier of steel bars); *Sangamon and Morgan Railroad Co.* v. *Henry*, 14 Ill. at 157 (shipment of hogs had to be sold before reaching their destination, at reduced price, due to delay and cold which injured hogs); *New York &c. Railroad Co.* v. *Estill*, 147 U. S. at 593, 594 (as result of train wreck, cattle were killed and injured); and, *Atlantic Mutual Insurance Co.* v. *Poseidon Schiffahrt*, 7 Cir., 313 F. 2d 872, 873 (1963) (the amount received for the goods was shown to be less than the market value at the time and place they were contracted to arrive).

The parties in the instant case stipulated that, "There was no physical damage to or deterioration of the produce. Plaintiff bases its claim for damages in this action solely on delay in the transportation and delivery of the produce and the decline in wholesale market price during the period of such delay * * *."

The district court found that "the plums * * * were merely sold by A & P at identical retail prices on Wednesday [the date of delivery] instead of Monday [the anticipated date of delivery]." 224 F. Supp. at 905.

It further found, "From the facts before me, including the stipulated 'usual practice' of plaintiff, I cannot assume, as plaintiff suggests, that A & P had no plums to satisfy customer demands on June 11th and that therefore A & P lost profits." *Id.* at 906.

"I find that A & P had shown no actual loss, damage or

injury and therefore is not entitled to recovery under the Carmack Amendment." *Id.* at 907.

A & P contends that these findings are clearly erroneous. It argues:

> "It is the nondelivery of perishables when needed by A & P on Monday, June 11, that establishes the fact of damage; it is on that date that the injury to A & P was complete and its rights were fixed.
>
> • • • • •
>
> "• • • [W]e have shown two key facts which the district court did not and could not deny. First is the stipulated fact that the Santa Fe was guilty of unreasonable and unexcused delay in delivering perishables to A & P. Second is the district court admission that 'A & P constantly moves the produce to the retail stores in time for sale in those stores on the day following its receipt by A & P from the carrier.'
>
> "It automatically follows from these key findings that A & P was injured on Monday, June 11, when it did not have for sale at retail on that day the plums which it had ordered for delivery on Sunday, June 10, to fulfill the stores' needs on the following day. This is the injury to A & P; this is the 'fact of damage.'"

Unexcused and unreasonable delay in shipment does not establish, *ipso facto,* actual damage. In the absence of a showing of, *e.g.,* decline in retail price, physical damage or deterioration, or sale at a reduced price on a "quick-sale" counter due to delay and anticipated spoilage we fail to see how A & P has established actual damage.

Proof of decline in wholesale price does not establish actual damage since the parties stipulated that A & P's daily price list issued to its retail stores "did not move up or down in relation to changes in the wholesale market prices during that period."

Unexcused and unreasonable delay establishes a wrong, but in the absence of proof of actual damage such wrong is not compensable under the Carmack Amendment or at common law. The opinion of the district court cites and quotes from cases which discuss the distinction between proof of a wrong and proof of damage. We adopt this portion of the district court's opinion. 224 F. Supp. at 907-909.[1]

Another facet of A & P's case, upon which it lays particular emphasis, concerns the finding of the district court that *"the plums • • • were • • • sold by A & P at identical retail prices on Wednesday instead of Monday."* (Emphasis added.) A & P contends that this finding is not supported by the stipulated facts or the evidence.

It is our judgment that this finding was the only reasonable one which the stipulation and evidence would permit the district court to make.

The burden of proving that the plums were sold at a dif-

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1 See *Illinois Cent. R. Co.* v. *Crail*, 281 U. S. 57 (1930); *Missouri Pacific Railroad Company* v. *H. Rouw Company*, 5 Cir., 258 F. 2d 445 (1958), cert. denied, 358 U. S. 929; *Weirton Steel Co.* v. *Isbrandtsen-Moller Co.*, 2 Cir., 126 F. 2d 593 (1942); *United States* v. *Palmer & Parker Co.*, 1 Cir., 61 F. 2d 455 (1932); *Lapidus* v. *Chicago, Burlington & Quincy Railroad Co.*, N. D. Ill., 161 F. Supp. 664 (1958); *Craig* v. *St. Louis-San Francisco Ry. Co.*, 120 Kan. 105, 242 P. 117 (1926); *C. L. Hils Co.* v. *Cincinnati N. O. & T. P. Ry. Co.*, 42 Ohio App. 103, 181 N. E. 819 (1931); and, *Lorenzo Demase, et al.* v. *Pennsylvania Railroad Company, et al.*, 104 Pitts. Legal Journal 155.

ferent retail price on Wednesday than they could have been sold for on Monday was on A & P. The facts to establish such proof were peculiarly within the sole reach of A & P and this burden may not be shifted to Santa Fe.

It was stipulated that the plums had not deteriorated, were not physically damaged and that the daily retail price list, which A & P issued to its stores, did not change the suggested price of plums during the period in issue.

A & P offered no evidence to show that its stores, due to delay in shipment, did not sell all the plums received or that they exercised their discretion and reduced the price.

We hold that the district court's findings challenged by A & P are not clearly erroneous and that A & P has not sustained its burden of proving actual damage as required by the Carmack Amendment. The district court, in reaching its decision, correctly considered and applied the applicable law.

The judgment appealed from is affirmed.

AFFIRMED.

APPENDIX.

STIPULATION OF FACTS.

* * * * *

1. Plaintiff, The Great Atlantic and Pacific Tea Company (herein sometimes referred to as "A & P"), is a New Jersey corporation engaged solely in the retail grocery business, operating retail stores in which it sells fresh fruits and vegetables and other items.

2. Defendant, The Atchison, Topeka and Santa Fe Railway Company, is a corporation engaged in business in Illinois and other states as an interstate common carrier by railroad. Defendant is a "carrier" within the meaning of that word as used in the Interstate Commerce Act, as amended, and was the initial carrier as described in Section 20(11) of the Interstate Commerce Act for the shipment described in paragraph 3 hereof. Said shipment was made under a Uniform Straight Bill of Lading which was issued by the initial carrier and signed by A & P and the initial carrier. A copy of the said Bill of Lading may be offered and received in evidence.

3. On June 2, 1956, a shipment was made by A & P consisting of a carload of California Beauty Plums (herein sometimes called "the produce"), from Redbank, California, consigned to A & P at Harlem River, New York, which is a receiving point for A & P for produce for the New York City area. The produce was delivered to A & P by the delivering carrier at 5:30 A.M. on June 12, 1956. Under the usual and customary time for transportation and delivery by railroad from Redbank, California to Harlem River, New York, the produce should have been delivered to A & P prior to 9:00 A.M. on June 10, 1956.

4. The period of delay was unreasonable and unexcused but was not intentional. The produce was not transported and delivered to A & P with "reasonable dispatch" within the meaning of that term in Section (2) of the "Contract Terms and Conditions" of the Uniform Straight Bill of Lading.

5. Since June 10, 1956 was a Sunday, the wholesale market quotations for Monday, June 11, 1956 are used by the wholesale produce trade to determine the wholesale market prices for produce delivered on Sunday by the carrier. For the dates June 11, 1956 and June 12, 1956 the "New York Daily Detailed Deciduous Report" (referred to in paragraph 15 hereof) showed the following data on wholesale market sales of California Beauty Plums in the New York City area:

MONDAY, JUNE 11, 1956

			Size					
Origin	Brand	Crates	3x4	4x4	3x4x5	4x5	5x5	Average
Parlier	Wagon Wheel	1,047		$6.65		$5.05	$4.17	$4.98
Calif.	Blue Bird	839				5.02	3.77	4.34
Arvin	Cinderella	1,040		7.15	$5.90	5.26	4.21	4.77
Fresno	Clo-Cal	726		7.60	6.15	5.75	4.35	5.80
								$4.93

TUESDAY, JUNE 12, 1956

Arvin	Cinderella	610		$5.10	$4.50	$4.19	$3.50	$4.06
Arvin	Arra	968		5.75	4.95	4.36	3.46	4.04
Arvin	Cinderella	777		5.25	4.60	4.13	3.31	3.73
Parlier	Wagon Wheel	1,045		5.85	5.00	4.41	3.41	4.40
Redbank	Old Mission	1,049	$5.90	5.90	5.20	4.51	3.75	4.64
Parlier	Wagon Wheel	1,045		6.01	5.00	4.42	3.42	4.55
Parlier	Wagon Wheel	1,047		6.20	5.05	4.43	3.31	4.13
Parlier	Wagon Wheel	1,050		6.35	5.15	4.37	3.17	3.80
								$4.19

For the purpose of this lawsuit only, defendant concedes that if the produce described in paragraph 3 hereof had been sold on the wholesale market in New York on June 12, 1956 the price per crate would have been 74 cents per crate less than if such sale had been made on such wholesale market on June 11, 1956. The produce described in paragraph 3 hereof was intended for sale and sold at retail in A & P stores in the New York City area and was not sold at wholesale.

6. It is the practice of A & P to purchase produce from growers in the area where such produce is grown and to have it shipped to it by common carrier in the area where the produce is to be sold in A & P retail stores. A & P orders produce from the growing area on the basis of the estimated need for such produce in the retail stores within 24 hours after the usual and customary time for the arrival of the produce from the growing area. Title to the contents of the shipments passes to A & P from the growers when the contents are loaded by the growers into the freight cars for shipment. These purchases and shipments are made by A & P for the purpose and with the intent of sale at retail in the A & P stores located in the respective destination areas. A & P does not sell on the wholesale market.

7. Produce is not stored for future use by A & P in either warehouses or retail stores. A & P customarily moves the produce to the retail stores in time for sale in those stores on the day following its receipt by A & P from the carrier.

8. The practices described in paragraphs 6 and 7 hereof were followed with respect to the contents of the shipment described in paragraph 3 hereof.

9. There was no physical damage to or deterioration of the produce. Plaintiff bases its claim for damages in this action solely on delay in the transportation and delivery

of the produce and the decline in wholesale market price during the period of such delay, as set forth in paragraph 5 hereof.

10. After delivery of the shipment described in paragraph 3 hereof, plaintiff filed with defendant a timely written claim for damages claimed to have resulted from the delay in delivery. The claim was for $740 and was computed on the basis stated in paragraph 5 hereof. After the claim was filed, defendant notified plaintiff that the claim was denied.

11. A & P does not keep, and to the knowledge of its officers and employees has never kept, records which would disclose with respect to shipments of produce sold at retail (a) whether all of such produce was sold, (b) the date or time of day when such produce was sold, (c) the store at which such produce was sold, (d) whether such produce was commingled with other produce of the same kind or quality at some or all A & P retail stores, or (e) any facts about the sale of such produce, including the price at which it was sold other than the daily price lists described in paragraph 12 hereof and the advertisements described in paragraph 15 hereof, neither of which constitutes a record of actual sales.

12. A & P issues to all retail stores in the New York Metropolitan area a daily price list which shows a retail selling price for each item of produce for that day. The price shown for California Beauty Plums on said A & P daily price lists did not change during the period from June 10, 1956 through June 15, 1956. Each retail store manager has independent authority from A & P to determine whether produce should be offered for sale at prices lower than the prices shown in said price lists and how often said prices should be reduced. Although the daily

retail price lists for the entire month of June, 1956 are not available, A & P concedes, for purposes of this case, that the prices quoted on such lists for produce of the kind and quality involved herein during the month of June, 1956 did not change as frequently as the wholesale market prices, and did not move up or down in relation to changes in the wholesale market prices during that period.

13. During the A & P's fiscal year ending February 28, 1957 (which included the period of the delayed shipment of produce referred to in this Stipulation), the following information with respect to A & P was applicable:

Retail Stores

Total A & P retail stores in the United States	4,013
Total A & P retail stores in the New York Metropolitan area*	667

All Sales

Total of all sales by A & P in the United States	$4,301,156,000
Total of all sales by A & P in the New York Metropolitan area	$ 871,062,000

Produce Sales Only

A & P's total sales of produce in the United States	$ 406,138,602
A & P's total sales of produce in the New York Metropolitan area	$ 78,831,111

* The New York Metropolitan area consists of New York City, Staten Island, Westchester County, Long Island, Rockland County and Orange County, all in the State of New York, together with the central and northern area of New Jersey and the southern part of Connecticut. This area is now served by only one A & P warehouse.

Cars of Produce

Total number of cars of produce delivered by carriers to A & P in the United States	70,702
Total number of cars of produce delivered by carriers to A & P in the United States with respect to which A & P filed claims against the carriers for delayed delivery	2,491*
Total number of cars of produce delivered by carriers to A & P in the New York Metropolitan area	13,885
Total number of cars of produce delivered by carriers in the New York Metropolitan area to A & P after delay in transit on part of carriers	3,497*
Total number of cars containing produce delivered to A & P in the New York Metropolitan area with respect to which A & P filed claims against the carriers for delayed deliveries	894*

Capacity of a Car of Plums

Approximate number of "California Beauty Plums" customarily shipped in one freight car equipped for shipping produce	218,236
Approximate number of crates containing "California Beauty Plums" customarily shipped in one freight car equipped to ship produce	1,000

* The defendant carrier does not agree that in all such cases the cars were delayed beyond the usual and customary time for transportation or that any delays beyond that time were unreasonable or unexcused.

In the New York Metropolitan area and in other metropolitan centers, pursuant to instructions from A & P, there is a routine practice for the carriers delivering cars of produce to place such cars on the public inspection tracks for inspection by A & P personnel. Thereafter, when a car is accepted by A & P, an order is given to the carrier to move such car to an A & P private siding for unloading. Customarily such car is delivered to the A & P private siding on the day on which it is inspected and accepted by A & P personnel at the public inspection tracks. From 12 to 24 hours may elapse from the time such car is placed on the public inspection tracks until it is delivered to the A & P private siding. At times A & P will arrange for immediate unloading of such cars of produce into trucks at the public inspection tracks for direct delivery to retail stores. On occasion, A & P may issue diversion orders to move a car from the public inspection tracks to some other city. On rare occasions A & P may allow a car to remain at the public inspection tracks after acceptance for a day or two before ordering the carrier to move the car to the A & P private siding. Cars are customarily unloaded by A & P promptly after they are delivered by the carrier to an A & P private siding. However, a car may remain at the A & P private siding from two hours to (on very rare occasions) 55 hours before it is released by A & P to the railroad.

14. The wholesale market price of produce is considered as one of several factors by A & P in determining the retail prices to be included in the price lists which are described in paragraph 12 hereof. The retail prices as shown in these price lists issued by A & P do not change as frequently as the wholesale market prices and often do not move up or down in relation to changes in the wholesale market prices.

15. In New York the "New York Daily Detailed Deciduous Report," published by the New York Daily Fruit and Vegetable Reporter, is the established source furnishing data from which shippers and carriers determine daily wholesale market prices for produce for which there have been sales of produce of like size, kind and quality on the day in question. As to retail prices, there are available in New York the A & P produce price lists described in paragraph 12 hereof and the advertised produce prices of A & P in the retail stores. The prices of many items of produce are not advertised by retail stores each day. Except to the extent that produce prices are advertised and the prices of such internal records of other retail stores as may be available, there are no other sources for obtaining retail market prices for produce in New York. There is no single, established source for obtaining retail prices which reflect actual produce transactions by retail stores in the New York City area.

16. This stipulation is entered into solely for the purpose of this case and shall not bind the parties in any other action.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

THE GREAT ATLANTIC & PACIFIC TEA COMPANY, INC., *Petitioner*,

v.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, *Respondent*.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

KENNETH F. BURGESS
D. ROBERT THOMAS
JAMES W. KNIGHT
WILSON C. DUNN, JR.

Attorneys for Respondent,

The Atchison, Topeka and Santa Fe Railway Company

Of Counsel:

SIDLEY, AUSTIN, BURGESS & SMITH
11 South La Salle Street
Chicago, Illinois 60603

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No. 627

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

THE GREAT ATLANTIC & PACIFIC TEA COMPANY, INC., *Petitioner,*

v.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, *Respondent.*

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

PRELIMINARY STATEMENT

The four judges who made the rulings on this matter in the two lower courts were unanimous in their decision. The Court of Appeals, in an opinion written by Chief Judge Hastings, affirmed the decision of Chief Judge Campbell in the District Court. Judge Hastings' opinion adopted by reference a portion of the opinion of the District Court, and we are therefore attaching a copy of the latter in the appendix to this brief, at pages A-1 *et seq.* It is reported at 224 F. Supp. 903. The opinion of the Court of Appeals is reported at 333 F. 2d 705 and is reproduced in the appendix to the petition of The Great Atlantic & Pacific Tea Company, Inc. ("A & P"). The stipulation of facts is set out as an appendix to the opinion of the Court of Appeals (Pet. 39 *et seq.*).

Contrary to A & P's assertions in its petition for a writ of certiorari, there was no proof in this case that the two-day delay of the shipment of plums resulted in a

scarcity of plums in any A & P stores. The lower courts held that A & P's assertions, repeated in its petition here, of an alleged scarcity and subsequent surplus of plums in its stores were neither stipulated nor supported by the stipulation of facts. Moreover, A & P did not find it necessary to buy any additional plums at the wholesale market to supply to its stores during the delay. It was stipulated that the plums in the shipment were not damaged, had not deteriorated, and were sold in the A & P stores. The retail price level remained steady and the contemporary decline in the price of plums at the wholesale market, where A & P does not operate, had no effect on A & P. No loss of any kind was incurred by A & P. An award to A & P, on the facts of this case, would have been an unjust enrichment.

The lower courts emphasized that the facts of this particular case showed no loss or injury to A & P. The courts also emphasized that in dismissing the complaint they were following accepted basic legal principles and applying them to the facts. The District Court, after considering both the facts and the legal principles, concluded that "From the facts in evidence I cannot thus depart from accepted traditional principles of the law of damages" (App. A-12). The Court of Appeals, quoting another circuit regarding the effect of delay in transportation, noted that "Each case must be governed by its own facts" (Pet. 33). The Court of Appeals also stated: "The district court, in reaching its decision, correctly considered and applied the applicable law" (Pet. 38). There is no conflict with decisions of this Court or of the Courts of Appeals, and the petition for writ of certiorari should be denied.

STATEMENT OF THE CASE

We regret the necessity for noting that A & P's petition for certiorari does not correctly state the facts of this case.

On page after page A & P states or infers that the delay in delivery of the shipment of plums involved in this case resulted in a "scarcity" of plums in A & P's retail stores on Monday, June 11, and a "surplus" on Wednesday, June 13 (Pet. 3, 6-7, 7, 8, 9, 11, 13). For example, A & P says that "The common sense result of the delay was, therefore, a scarcity of plums in some stores on Monday and a surplus in some stores on Wednesday" (Pet. 7). It is on the basis of such a supposed factual situation that A & P argues that it was damaged and seeks further review of this case. Referring to an alleged lack of plums in the stores to satisfy the needs of the stores and consumers, A & P says: "This injury to A & P's operation is the realistic 'fact of damage' in this case" (Pet. 3). But the actual situation is that no such facts were stipulated or otherwise introduced into the record.

Both of the lower courts considered A & P's assertions, in its briefs, of such claimed facts. Both courts held that A & P's assertions in this respect had not been proved. There was no showing that any A & P store either lacked sufficient plums for its needs, or had a surplus of plums, and no indication that consumers were affected in any way. The facts claimed by A & P were not among the facts stated in the stipulation, and the stipulation, together with a bill of lading, constituted the only evidence in this case. The facts that were stipulated do not support the assertions repeated by A & P here.

The District Court reviewed the facts which were presented by the stipulation and then stated in part as follows:

> "With this built-in flexibility, there is no showing that A & P had fewer plums for sale in its stores on Monday than it had intended in advance or that it had more plums on Wednesday." (App. A-8)

Chief Judge Campbell further noted that "A & P did not find it necessary to purchase plums on the wholesale market to supply its stores for Monday." He found that "there was no such rigidity of operations as A & P implies in its brief" (App. A-8).* He then stated: "From the facts before me, including the stipulated 'usual practice' of plaintiff, I cannot assume, as plaintiff suggests, that A & P had no plums to satisfy customer demands on June 11th and that therefore A & P lost profits" (App. A-8).

The Court of Appeals, at A & P's request, reviewed the findings in the light of the evidence. It quoted part of the above excerpts from the District Court's findings of fact

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* The stipulation included the following:

"In the New York Metropolitan area and in other metropolitan centers, pursuant to instructions from A & P, there is a routine practice for the carriers delivering cars of produce to place such cars on the public inspection tracks for inspection by A & P personnel. Thereafter, when a car is accepted by A & P, an order is given to the carrier to move such car to an A & P private siding for unloading. Customarily such car is delivered to the A & P private siding on the day on which it is inspected and accepted by A & P personnel at the public inspection tracks. From 12 to 24 hours may elapse from the time such car is placed on the public inspection tracks until it is delivered to the A & P private siding. At times A & P will arrange for immediate unloading of such cars of produce into trucks at the public inspection tracks for direct delivery to retail stores. On occasion, A & P may issue diversion orders to move a car from the public inspection tracks to some other city. On rare occasions A & P may allow a car to remain at the public inspection tracks after acceptance for a day or two before ordering the carriers to move the car to the A & P private siding. Cars are customarily unloaded by A & P promptly after they are delivered by the carrier to an A & P private siding. However, a car may remain at the A & P private siding from two hours to (on very rare occasions) 55 hours before it is released by A & P to the railroad." (Stip. par. 13; Pet. 45).

and noted that A & P was contending that the findings were erroneous (Pet. 35-36). The Court of Appeals, however, found no merit in A & P's contention that it should assume or find the existence of facts different from the facts found in the trial court.

Nowhere in its petition does A & P inform the Court that what it is stating to be the facts of this case regarding a supposed scarcity ("the lack of a sufficient quantity of perishables to satisfy the needs of the stores and consumers" (Pet. 3)) and a supposed surplus of plums in its stores were merely its own assertions in its briefs to the lower courts, and that those courts have found that these factual assertions lacked proof in the record. At pages 10 and 11 of the petition, A & P quotes what appears to be a paragraph from the opinion of the Court of Appeals, with asterisks which might be understood to indicate the omission of only part of a sentence.* The part of the opinion so omitted by A & P, however, includes the following statement by the Court of Appeals:

> "It [the District Court] further found, 'From the facts before me, including the stipulated "usual practice" of plaintiff, I cannot assume, as plaintiff suggests, that A & P had no plums to satisfy customer demands on June 11th and that therefore A & P lost profits.' *Id.* at 906." (Pet. 35)

By claiming "facts" which were not in evidence and which were expressly found to have been unproved, A & P is asking this Court to review and declare the legal principles that might be applicable to a case different from the present one. And A & P does so without even mentioning

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* While A & P's page reference at the end of the quotation is to page 36 of its appendix, the quotation begins with an excerpt from page 34.

that both lower courts found that the proved facts were different from those now asserted here.

The proved facts showed no loss, damage or injury to A & P in this case.

This shipment of plums from California to New York City was delivered to A & P two days beyond the usual eight-day transportation period, but the delay, although unreasonable and unexcused, was stipulated to have been "not intentional" (Stip. par. 4; Pet. 40). A & P conceded by stipulation that "There was no physical damage to or deterioration of the produce" (Stip. par 9; Pet. 41). There is no claim that any of the plums were spoiled. They were "sold at retail" (Stip. par. 5; Pet. 41).

A & P's daily price lists for its retail stores in the New York City area showed identical prices for such plums on each day of the week in question (Stip. par. 12; Pet. 42-43). The effect of the two-day delay was that the plums from this shipment were available for sale on Wednesday instead of on Monday and not that sales were made for a lower price. The District Court made a finding of fact (approved by the Court of Appeals) that "there was no physical damage to or deterioration of the plums which were merely sold by A & P at identical retail prices on Wednesday instead of Monday" (App. A-5).*

By this suit, A & P seeks to be paid an amount equal to the amount by which the price of plums declined on the wholesale market during the delay. While a wholesale market for produce exists at New York City and the prices

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* A & P's objection to the latter part of this finding of fact was reviewed and held by the Court of Appeals to be without merit. The court stated: "It is our judgment that this finding was the only reasonable one which the stipulation and evidence would permit the district court to make" (Pet. 37).

on that wholesale market fluctuate up or down, the shipment here involved had no relation to that wholesale market. "A & P does not sell on the wholesale market" (Stip. par. 6; Pet. 41). "The produce * * * was intended for sale and sold at retail in A & P stores in the New York City area and was not sold at wholesale" (Stip. par. 5; Pet. 41). During the month in which this shipment was transported and the contents sold by A & P, the prices on A & P's daily price lists in the New York City area for plums of this kind "did not change as frequently as the wholesale market prices, and did not move up or down in relation to changes in the wholesale market prices during that period" (Stip. par. 12; Pet. 42-43). "The retail prices [of produce in general] as shown in these price lists issued by A & P do not change as frequently as the wholesale market prices and often do not move up or down in relation to changes in the wholesale market prices" (Stip. par. 14; Pet. 45).

Despite the lack of relationship between the shipment here involved and the wholesale market or the fluctuations of prices at that market, it is stipulated that

> "Plaintiff bases its claim for damages in this action *solely* on delay in the transportation and delivery of the produce and the decline in *wholesale* market price during the period of such delay, as set forth in paragraph 5 hereof." (Stip. par. 9; Pet. 41-42; emphasis added)

A & P makes no claim that the decline in wholesale price caused a loss to it or in any way affected its profits. But if, having sold the plums at retail, A & P were then to be enabled to receive the amount by which the wholesale price had declined, A & P would enhance its profits. A & P states that its profit margin is a fraction of a cent on sales of produce items (Pet. 4). The $740 sought on this shipment of 1,000 crates would be an added amount for A & P

of four cents for a dozen plums (Stip. pars. 10 and 13; Pet. 42 and 44). If it could obtain this *additional* amount of four cents for each dozen plums, it would multiply its profits several fold. And, although this case concerns but one shipment, A & P is making thousands of such claims against various carriers (Pet. 15, 28). On its theory of recovery without proof of damage, wholesale market price decline during a delay in transportation would become A & P's good fortune, enabling it to receive more in cases of delay than it would have received had there been no delay.

In this case the District Court's findings of facts, supported by the stipulation and approved by the Court of Appeals, showed that (1) there was no proof of a lack or surplus of plums in any A & P stores on any day as a result of this delay; (2) the plums were sold by A & P at the same prices at which A & P would have sold them if there had been no delay; and (3) the decline in prices on the separate wholesale market did not affect A & P's operations or profits.

The basic finding here, on the facts of this case, was expressed by the District Court as follows:

> "I find that A & P had shown no actual loss, damage or injury and therefore is not entitled to recovery under the Carmack Amendment. *Illinois Central Railroad Co.* v. *Crail,* 281 U.S. 57, 63, 50 S.Ct. 180, 74 L.Ed. 699. Neither is plaintiff entitled to recover under the traditional common law concept of damages for, as Mr. Justice Stone stated in *Illinois Central Railroad Co.* v. *Crail, supra,* 281 U.S. at p. 63, 50 S.Ct. at p. 181, 74 L.Ed. 699: 'This contention ignores the basic principal underlying common law remedies that they shall afford only compensation for the injury suffered.'" (App. A-9)

The Court of Appeals similarly stated that "it is our view that A & P has failed to sustain its burden of proving that it suffered actual damage due to the delay in delivery" (Pet. 34).

The statute involved in this case is Section 20 (11) of the Interstate Commerce Act (49 U.S.C. Sec. 20 (11)), sometimes referred to as the Carmack Amendment. That section makes an initial carrier, such as the respondent Santa Fe here, "liable to the lawful holder [of the bill of lading] for the full actual loss, damage or injury to such property caused by it or by any [connecting carrier] * * *." Under the Carmack Amendment, it is no longer necessary to prove that the particular defendant railroad caused the loss proved by the shipper, but, as at common law, there is no right of recovery in the absence of loss. In the words of Mr. Justice Stone, speaking for the Court, the statute "gives only a right of recovery for 'actual loss.'" *Illinois Central Railroad Co.* v. *Crail,* 281 U.S. 57 (1930). Where no "actual loss, damage or injury" is proved, there is no liability. Congress has not provided for the payment to a shipper of any amount except as reimbursement for actual loss, damage or injury.*

QUESTION PRESENTED

We believe the question set out by A & P as being the question here is not appropriately stated. The question in this case, we submit, is as follows: Where the facts of the case show no loss, damage or injury to a shipper of a delayed shipment for sale at retail, is the shipper entitled to an award of damages in a suit against the initial carrier

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* A payment by a railroad to a shipper where no loss, damage or injury is shown, or any payment in excess of such loss, would be a rebate prohibited by Section 1 of the Elkins Act (49 USC Sec. 41(1)). *United States* v. *Wishnatzki,* 7 F. Supp. 313 (S.D.N.Y. 1934).

under Section 20 (11) of the Interstate Commerce Act (49 U.S.C. Sec. 20 (11))?

Under the caption "Question Presented," A & P submits a two and a half page discussion of the alleged facts of this case, intermingled with argument. Since the discussion is based on A & P's assumed facts which, as the lower courts found, were not proved in this case, the discussion is irrelevant to the issue here.

REASONS FOR DENYING THE WRIT

As noted above, the petition is predicated on the existence of a claimed factual situation that is not present in this case. No loss, damage or injury of any kind was shown, and there was no showing that the delay of this shipment had any effect on A & P's stores or on its customers. The trial court's findings of fact and conclusions have been reviewed and affirmed by a unanimous Court of Appeals. There is no conflict with any decision of this Court or of the Courts of Appeals. The petition for writ of certiorari should be denied.

Two cases regarding the effects of delay in transportation illustrate the principles involved. Where a shipper has proved actual damage by a delay, the railroad is liable but where, as here, the delay and a decline in wholesale prices during the delay are not shown to have damaged the shipper, there is no liability. In *New York P. & N. R. R. Co.* v. *Peninsula Produce Exchange of Maryland,* 240 U.S. 34 (1916), a decline in prices during the delay was shown to have reduced the amount received by the shipper and the award to him of the amount of the decline made him whole. However, where a dealer in wheat for export had not shown that the delay of certain shipments had caused him any loss, damage or injury, he was denied recovery although the wholesale prices of wheat had declined during the delay.

Craig v. *St. Louis-San Francisco Ry. Co.*, 242 Pac. 117, 243 Pac. 1050 (Kansas, 1926), certiorari denied 273 U.S. 714. Other decisions denying recovery where a delay, accompanied by decline in prices, has not been shown to have resulted in actual loss are referred to in the opinions of the District Court and the Court of Appeals in this case.

None of the cases claimed by A & P to have been in conflict with the decision below involved delays in transportation or delivery. In all of them the contents of the shipments had either been destroyed or physically damaged in the course of the transportation; actual losses had been incurred. The issues with which those cases were concerned are not present here.

In one of those cases a shipment of cattle was seriously injured in a train wreck. *New York, L. E. & W. R. Co.* v. *Estill,* 147 U.S. 591 (1893). In affirming the judgment for the plaintiffs, the Court noted that the trial court had given the following instruction to the jury:

> "The jury are instructed that plaintiffs are only entitled to recover in this case such damages as they have shown by the preponderance of the evidence were the natural and proximate consequence of the acts complained of in the petition, and that they are not entitled to recover any damages which could have been avoided or prevented by the plaintiffs by the exercise on their part of reasonable and proper care and prudence." (pp. 599-603)

In this A & P case, the plaintiff has shown no damage whatsoever as "the natural and proximate consequence of the acts complained of in the petition." As it had intended from the outset, it sold the shipment in its stores, where the price level remained stable. The decline in the wholesale market prices affected it not at all; and the claimed disruption of its operations, regarding the assertions in

its briefs about a scarcity or surplus of plums in its stores, was found not to have been proved.

In *Reider* v. *Thompson*, 197 F. 2d 158 (C.A. 5, 1952), cited by A & P as being in conflict with the decisions below, the plaintiff, seeking recovery for damage to sheepskins, showed that the sheepskins had been damaged and showed what the fair market value of the sheepskins would have been if they had been received from the carrier in good condition ($5,400). He then showed the percentage extent of their physical damage and also the dollar amount of their fair market value in their damaged condition ($2,700). He had presented a complete prima facie case showing both the fact of damage and the extent thereof and he was therefore held to have been entitled to have his case considered by the trial court on the merits. His evidence, of course, was subject to impeachment by the defendant, including a showing of how much the plaintiff had received on the sale of the sheepskins. The court made it clear that it would not approve a result which would award the plaintiff "more than indemnity." The plaintiff's case, however, had shown damage. Here the existence of damage to A & P was not shown; an award to it would have been a bonus rather than indemnity.

Both of the final two cases claimed by A & P to be in conflict with the decision here were ones where the shipper's commodities had been lost or destroyed in the course of their transportation by railroad. *Fort Worth and Denver Ry. Co.* v. *United States*, 242 F. 2d 702 (C.A. 5, 1957); *United States* v. *N. Y., N. H. & H. Ry. Co.*, 211 F. 2d 404 (C.A. 2, 1954). The fact of damage was clear and the judgments in favor of the shipper for the value of the lost or destroyed property at destination merely compensated it for its loss of the property. The shipments were made by the United States on government programs to aid the con-

signees. In one the recipient was to get the shipment at half price; in the other the recipient was to pay no price. These circumstances had nothing to do with the fact that the shipper's property had been lost or destroyed and the railroad was responsible for the loss. Moreover, the intended purpose of the shipments could not have been fulfilled except by other goods of the same value. The judgments simply indemnified the government. They afford no support to A & P's claim for an extra profit; its shipment had not been lost or damaged and it had used the plums by selling them in its retail stores without loss of profit. There is no conflict in the cases.

A & P's attempt to obtain arbitrary payments from the railroad whenever the price of produce on the separate wholesale market declines during a period of delay, despite the absence of any damage to A & P, is flatly opposed both to the provisions of the Carmack Amendment ("actual loss, damage or injury") and to the fundamental principles of the compensatory nature of damages. Like other shippers, A & P is entitled to damages only where the facts show that it has been damaged and only to the extent of compensation for the actual loss. There is no merit in its contention that it should be paid the amount of the wholesale price decline in any case of delay on the theory that if in some cases it really suffered a loss it would have difficulty in proving the loss. As the District Court stated, "I am not convinced by its arguments and am of the opinion that damages can be ascertained and proved by resort to retail prices and other means where actual damage occurs in a given case" (App. A-6). A & P's claim that it would have to trace each plum to its sale in order to show "with certitude" the existence and amount of damage is plainly incorrect. Even as to wholesale prices there is no certitude as to what price would have been received if the shipment

had been sold on that market, where wide variations of prices occur even on a single day (Stip. par. 5; Pet. 40). Reasonable proof of damage is all that is required, but A & P here sought to recover without any proof of damage.

The case here is entirely different from a situation where damage has been proved. That was the situation in the antitrust cases, cited by A & P, where losses in sales and profits were proved to have resulted from the defendants' violations of the Sherman Act and judgments for the plaintiffs in the trial courts were therefore sustained on appeal. *Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U.S. 555 (1931); *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U.S. 251 (1946); *Eastman Kodak Co.* v. *Southern Photo Materials Co.*, 273 U.S. 359 (1927). In the *Story Parchment* case, for example, the Court stated that "It is true that there was uncertainty as to the extent of the damage, but there was none as to the fact of damage; • • •" (p. 562). In *Bigelow*, where the defendants had unlawfully prevented the plaintiff from showing first run movie films, the plaintiff showed the amount of its loss of receipts and the Court stated that "The evidence here was ample to support a just and reasonable inference that petitioners were damaged by respondents' action • • •" (p. 266). In *Eastman* the Court described the defendant's refusal to continue to sell its goods to the plaintiff at dealers' discounts and described the extensive evidence as to the resulting loss of profits. It noted that "The jury was instructed, in effect, that the amount of the damages could not be determined by mere speculation or guess, but must be based on evidence furnishing data from which the amount of the probable loss could be ascertained as a matter of reasonable inference" (p. 379). In the present case, in contrast, the facts showed that A & P was not damaged and that an award to it would have given it more money than it would have had if the shipment had not been delayed.

This case was decided—and properly so—on its particular facts, and the suppositious facts which are the subject of A & P's petition simply were not present here. No loss was shown to have resulted from this delay and the decision denying recovery in this case is in accord, rather than in conflict, with the decisions of this Court and of other courts. The District Court appropriately referred to a decision of the Privy Council where another shipper of a delayed shipment had sought to profit from a showing of decline in prices which had not affected him:

> "As Lord Atkinson said in denying plaintiff's claim in Wertime v. Chicoutime Pulp Co., L.R. (1911) A.C. 301, 308, that such a plaintiff seeks 'against all justice to be permitted to make a profit by breach of contract, by compensating for a loss he never suffered, and be put, so far as money can do it, not in the same position in which he would have been if the contract had been performed but in a much better position.'" (App. A-6)

CONCLUSION

For the reasons stated above, the petition for writ of certiorari should be denied.

Respectfully submitted,

KENNETH F. BURGESS
D. ROBERT THOMAS
JAMES W. KISSEL
WILBUR C. DELP, JR.

Attorneys for Respondent,

The Atchison, Topeka and Santa Fe Railway Company

Of Counsel:

SIDLEY, AUSTIN, BURGESS & SMITH
11 South La Salle Street
Chicago, Illinois 60603

APPENDIX

OPINION OF THE

United States District Court

FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

THE GREAT ATLANTIC & PACIFIC TEA COMPANY, INC., *Plaintiff,* v. **THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY,** *Defendant.*	No. 57 C 745

January 6, 1964

CAMPBELL, Chief Judge.

This cause, a claim for damages by plaintiff, The Great Atlantic and Pacific Tea Company, Inc., against defendant, The Atchison, Topeka and Santa Fe Railway Company alleging unreasonable and unexcused delay in a shipment, having come on for trial upon a stipulation of facts, is presently before me upon the briefs of the parties.

The facts are as follows: Plaintiff Great Atlantic & Pacific Tea Company (hereinafter referred to as "A & P") is a New Jersey corporation engaged solely in the retail grocery business operating retail stores in which it sells fresh foods, vegetables and other items. Defendant, The Atchison, Topeka and Santa Fe Railway Company (hereinafter referred to as "Santa Fe"), is a corporation engaged in business in Illinois and other states as an interstate common carrier by railroad. Defendant is a "carrier" within the meaning of that word as used in the Interstate Commerce Act, as Amended, and was the initial carrier as

described in Section 20(11) of the Interstate Commerce Act, Title 49, U.S.C., Section 20(11) for the shipment of plums described below. This shipment was made under a uniform straight bill of lading issued by Santa Fe and signed by A & P and Santa Fe.

On June 2, 1956 a shipment was made by A & P consisting of a carload of California Beauty Plums from Red Banks, California consigned to A & P at Harlem River, New York, which is one of the receiving points of A & P for produce for the New York area. The plums were delivered to A & P by Santa Fe at 5:30 A.M. on June 12, 1956. Under the usual and customary time for transportation and delivery by railroad from Red Banks, California to Harlem River, New York, the plums should have been delivered to A & P prior to 9:00 A.M. on June 10, 1956. The period of delay was unreasonable and unexcused but was not intentional. The produce was not transported and delivered to A & P with "reasonable dispatch" within the meaning of that term in Section 2 of the "contract, terms and conditions" of the uniform straight bill of lading.

For the purpose of this lawsuit only Defendant concedes that if the plums had been sold on the wholesale market in New York on June 12, 1956 the price per crate would have been 74¢ per crate less than if such sale had been made on such wholesale market on June 11, 1956 (June 10, 1956 was a Sunday and therefore the wholesale market quotations for Monday, June 11, 1956 are used by the wholesale produce trade to determine the wholesale market prices for produce delivered on Sunday by a carrier). The plums were intended for sale and were sold at retail in A & P stores in the New York City area and were not sold at wholesale.

It is the practice of A & P to purchase produce from growers in the area where such produce is grown and to have it shipped to itself by common carrier in the area where the produce is to be sold in A & P retail stores. A & P orders produce from the growing area on the basis of the estimated need for such produce in the retail stores within 24 hours after the usual and customary shipping time for the retail store area from the growing area. Title to the contents of the shipment passes to A & P from the growers when the contents are loaded by the growers into the freight cars for shipment. These purchases and shipments are made by A & P for the purpose and with the intent of sale at retail in the A & P stores located in the respective destination areas. A & P does not sell on the wholesale market. Produce is not stored for future use by A & P in either warehouses or retail stores. A & P constantly moves the produce to the retail stores in time for sale in those stores on the day following its receipt by A & P from the carrier.

The practices described above were followed with respect to the shipment of plums herein.

In the New York metropolitan area, pursuant to instructions from A & P, there is a routine practice for the carrier delivering cars of produce to place such cars on the public inspection tracks for inspection by A & P personnel. Thereafter, when a car is accepted by A & P, an order is given to the carrier to move such car to an A & P private siding for unloading. Customarily such car is delivered to the A & P private siding on the day on which it is inspected and accepted by A & P personnel at the public inspection tracks. From 12 to 24 hours may elapse from the time such car is placed on the public inspection tracks until it is delivered to the A & P private siding. At times A & P will arrange for immediate unloading of such cars of produce to trucks at the public inspection tracks for direct delivery to retail

stores. On occasion A & P may issue diversion orders to move a car from the public inspection tracks to shipment to the city. On rare occasions A & P may allow a car to remain at the public inspection tracks after acceptance for a day or two before ordering the carrier to move the car to the A & P private siding. Cars are customarily unloaded by A & P promptly after they are delivered by the carrier to an A & P private siding. However, a car may remain at the A & P private siding from two hours to (on very rare occasions) 55 hours before it is released by A & P for return to the railroad.

A & P issues to all retail stores in the New York metropolitan area a daily price list which shows a retail selling price for each item of produce for that day. The price shown for plums on said A & P daily price list did not change during the period from June 10, 1956 to June 15, 1956. Each retail store manager has independent authority from A & P to determine whether produce should be offered for sale at prices lower than the prices shown in said price list and how often such prices should be reduced. Although the daily retail price lists for the entire month of June 1956 are not available, A & P concedes for purposes of this case that the prices quoted on such lists for plums of the kind and quality involved herein during the month of June, 1956 did not change as frequently as the wholesale market prices and did not move up or down in relation to changes in the wholesale market prices during that period. The wholesale market price of produce is considered as one of the several factors used by A & P in determining the retail prices to be included in the price lists described above.

A & P does not keep and to the knowledge of its officers and employees has never kept records which would disclose with respect to shipment of produce sold at retail (a) whether all of such produce has been sold, (b) the date or

time of day when such produce was sold, (c) the store at which such produce was sold, (d) whether such produce was commingled with other produce of the same kind or quality at some A & P retail stores, or (e) any facts about the sale of such produce, including the price at which it was sold other than the daily price list described above and advertisements, neither of which constitutes a record of actual sales.

There was no physical damage to or deterioration of the plums. A & P bases its claim for damages in this action solely on delay in the transportation and delivery of the plums and the decline in the wholesale market price during the period of such delay as set forth above.

Plaintiff points out that this case involves a head-on collision between the excuse of "injury without damage" and the axiom of "every wrong has a remedy." Broadly speaking, I would agree since the delay of two days is a wrong and yet there was no physical damage to or deterioration of the plums which were merely sold by A & P at identical retail prices on Wednesday instead of Monday.

Since plaintiff in this case cannot look to retail prices as a measurement of damages, as it concedes is the natural impulse, it instead bases its claim on a decline in wholesale prices during the critical period. The obvious difficulty with plaintiff's contention is that the wholesale market criterion of damages suggested in this case is, as plaintiff recognizes, unrealistic. Except for plaintiff's theory of replacement which I cannot accept in this case, I find no correlation between the stipulated facts of the wholesale market to justify this as measure of damages. A & P shipped its own plums intending them for sale and selling them at retail. The retail and wholesale market price levels move independently of each other. The wholesale prices on various kinds of plums of different quality and condition on Monday, June

11, 1956, consisted of 13 prices ranging from $3.77 to $7.60. It is not known how many crates sold at each price. The unweighted average was $4.93 per crate. On Tuesday, June 12, 1956, wholesale prices on various kinds of different quality and condition plums consisted of 30 prices ranging from $3.17 to $6.35, the unweighted average being $4.19, which accounts for the stipulated 74 cents decline in the wholesale market. I find that the wholesale market criterion suggested by plaintiff is, in this case, an illogical and improper measure of damages bearing no relationship to the facts. I find that the replacement value theory advanced by plaintiff is not applicable under the facts of this case since A & P did not purchase substitute plums in the New York wholesale market at the time when it should have received delivery of this shipment. Though A & P claims that it is impracticable to resort to retail prices to measure actual damages and cites various reasons, I am not convinced by its arguments and am of the opinion that damages can be ascertained and proved by resort to retail prices and other means where actual damage occurs in a given case. To apply this criterion in this case would result in an unjust enrichment to plaintiff. As Lord Atkinson said in denying plaintiff's claim in Wertime v. Chicoutime Pulp Co., L.R. (1911) A.C. 301, 308, that such a plaintiff seeks "against all justice to be permitted to make a profit by breach of contract, by compensating for a loss he never suffered, and be put, so far as money can do it, not in the same position in which he would have been if the contract had been performed but in a much better position." Also see U. S. v. Palmer & Parker Co., 1 Cir., 61 F.2d 455, 461; Pastor v. B. Lindner & Bro., 233 App. Div. 396, 253 N.Y.S. 184, 187. A & P states that it lost profits because of this delay. It states that "A & P did not have the plums when they were needed to satisfy the needs of its stores and therefore its customers. This we submit establishes fact of damage." At

another point it says "the inevitable result, therefore, was a scarcity of plums to satisfy customer demand on June 11. This scarcity was in no way relieved by the surplus which A & P had two days later as the result of the delayed delivery of the plums on top of those already ordered for delivery to meet A & P's needs at that time." It also states that "the real damage (loss of profits resulting from inability to sell at retail on June 11) cannot be proved * * *." These statements imply that A & P would have been able to sell these plums only on Monday, June 11, but was unable to do so when the plums actually arrived, thereby losing the anticipated profits. Since there was no physical damage to or deterioration of the plums and since the plums were sold at identical retail prices, the facts are to the contrary. Further, there is nothing in the record about the other California Beauty Plums sold by A & P in its New York City stores during the days in question except to the extent that it may be inferred from the fact that daily prices for such plums were issued by A & P, that others were being sold. A & P has not shown how many other cars of these plums it received during this period either at the Harlem River receiving point or at other New York warehouses in the New York Metropolitan Area. The evidence reveals that the plums in this shipment were sold on Wednesday rather than on Monday and that A & P's practice was to order from the growers in California at least eight days or more in advance on the basis of the advanced estimate of need in the stores within 24 hours after delivery. The evidence also reveals that A & P allows itself a leeway of flexibility in time of railroad delivery of produce. It does this by having the railroad place cars on public inspection tracks at destination prior to delivery on the A & P private siding and 12 to 24 hours may elapse before the final railroad move is made. The cars are available to A & P at that earlier placement and at times A & P takes the produce

from the cars at that point. Moreover, on rare occasions A & P may allow a car to remain at that earlier placement for a day or two before ordering the carrier to move it to the A & P private siding for unloading and release of the empty car. And on the siding A & P may allow the cars to wait from 2 to 55 hours before releasing the cars again to the railroad. Moreover, A & P diverts cars to other cities different from the original destination. With this built-in flexibility, there is no showing that A & P had fewer plums for sale in its stores on Monday than it had intended in advance or that it had more plums on Wednesday. Indeed, the fact that A & P did not find it necessary to purchase plums on the wholesale market to supply its stores for Monday, and to sell this shipment on that market as surplus, shows that there was no such rigidity of operations as A & P implies in its brief. Moreover, even if A & P sold a lesser quantity of plums on Monday than it had expected to sell, it suffered no loss by selling more plums on Wednesday instead of Monday at the same price level. From the facts before me, including the stipulated "usual practice" of plaintiff, I cannot assume, as plaintiff suggests, that A & P had no plums to satisfy customer demands on June 11th and that therefore A & P lost profits. For these reasons I find that A & P had failed to show a loss of profits.

Since this was an interstate shipment the Carmack Amendment, Title 49 U.S.C., Sec. 20(11) is applicable, which provides in part as follows:

> "• • • any such common carrier, railroad, or transportation company so receiving property for transportation • • • or any common carrier, railroad, or transportation company delivering said property • • • shall be liable to the lawful holder of (the bill of lading) • • • for the *full actual loss, damage, or injury* to such property caused by it or by any (connecting carrier) • • • notwithstanding any limitation of the amount

> of recovery or representation or agreement as to value in any such receipt or bill of lading, or in any contract, rule, regulation, or in any tariff filed with the Interstate Commerce Commission; * * *" (49 U.S.C.A. § 20 (11)).

I find that A & P had shown no actual loss, damage or injury and therefore is not entitled to recovery under the Carmack Amendment. Illinois Central Railroad Co. v. Crail, 281 U.S. 57, 63, 50 S.Ct. 180, 74 L.Ed. 699. Neither is plaintiff entitled to recover under the traditional common law concept of damages for, as Mr. Justice Stone stated in Illinois Central Railroad Co. v. Crail, supra, 281 U.S. at p. 63, 50 S.Ct. at p. 181, 74 L.Ed. 699: "This contention ignores the basic principal underlying common law remedies that they shall afford only compensation for the injury suffered."

In U. S. v. Palmer & Parker Co., 61 F.2d 455, at pp. 459, 460, the court stated:

> "There is only one rule, of universal application, in such cases, and that is to give compensation for the loss suffered.
>
> " * * *
>
> "To repeat, the applicable rule is the actual loss, to the appellee, by the delay in delivery of this cargo of logs, for use in its business as a manufacturer and seller of mahogany veneers, etc."

In Craig v. St. Louis-San Francisco Railway Co., 120 Kan. 105, 242 P. 117, the court stated as follows:

> "For present purposes it may be said that an invasion of a legally protected interest imports injury, and injury is redressed by damages. Quantum of damages depends on extent of injury caused by the invasion. If nothing but the invasion appear, the injury is technical, and is compensated by nominal damages.

> To warrant substantial damages, there must be substantial injury. When substantial injury has been shown, the law concerns itself with expression of the idea of reparation in terms of money. • • •"

In C. L. Hils Co. v. Cincinnati, N. O. & T. P. Ry. Co., 42 Ohio App. 103, 181 N.E. 819, at p. 821, the court stated as follows:

> "Recovery of damages for delay in shipment must be limited to compensation for loss. Such damages are not to be identified as a penalty imposed upon the carrier for failure to deliver on time."

In Lorenzo Demase and Sam Manna, Partners Trading as Demase & Mann Company v. Pennsylvania Railroad Company, Court of Common Pleas of Allegheny County, Pennsylvania 1954, reported in 104 Pitts. Legal Journal 155, it is stated as follows:

> "It is fundamental that in an action for damages the plaintiff must show the breach or other wrong by defendant; he must show that he was damaged in consequence of the wrong; and finally, the extent of damage is determined by applying some accepted measure. Here, plaintiffs showed delay on the part of the defendant carrier, and they presented evidence of decline in market value, the usual measure of damages in shipment cases. We cannot apply a customary measure of damages unless the fact of damage is first demonstrated, as the measure is, after all, only an accepted guide to get at the dollars and cents amount of damage sustained. In this case, the plaintiffs seek to recover what they might have lost had they planned to sell each shipment on the day it arrived. However, the fact remains that they did not show any actual loss at all, for the reason that the tomatoes were first processed through the ripening plant, mingled with other shipments and repacked, and plaintiffs themselves made no attempt to trace the sale of the tomatoes in any particular shipment. Indeed, when the tomatoes were eventually sold sometime after their

> arrival date, plaintiffs may just as likely have realized a gain rather than a loss. To arbitrarily apply a measure of recovery whenever delay in transit occurs, without any showing of whether or not a loss was actually occasioned, would render the damages speculative and punitive, rather than compensatory."

In Lapidus v. Chicago, B. & Q. R. Co., D.C., 161 F.Supp. 664, at p. 667, Judge Knoch entered the following findings of fact and conclusions of law:

> "16. Plaintiffs proved that the Chicago wholesale market declined in an aggregate amount of $4,501.59 between the 6th and 7th mornings for perishables of the kinds that were carried in the 63 shipments. Plaintiffs did not prove that the perishables in the 63 shipments were comparable in quality and condition to those sold on the Chicago wholesale market, did not prove that they sold the perishables in the 63 shipments upon the declining markets between the 6th and 7th mornings, and did not prove that they suffered actual losses equivalent to the declines that the market experienced. • • •
>
> "5. Plaintiffs' proof of loss because of market declines on goods allegedly delayed was insufficient to carry their burden of proof on the issue of damages where they relied exclusively on market quotations to establish the fact of decline, but failed to link the market quotation declines to their own experience in selling on the declining market, and failed to correlate the quality and condition of their own goods to the quality and condition of the goods in the market quotations."

Judge Learned Hand, in Weirton Steel Co. v. Isbrandtsen-Moller Company, 126 F.2d 593 at pp. 594-595, stated as follows:

> "The ordinary rule is indeed that damages for injury to goods while in possession of a carrier are to be computed at the difference between the sound market

value at destination and the value as damaged. * * * That is obviously the right measure where the consignee buys the goods for resale which is the ordinary case; but at times it works out to give him more than indemnity, and when it does, the courts have refused to adopt it. * * *

"We have therefore no doubt that, if it affirmatively appeared that the Texas Company had sold the cans and their contents at no reduction, the libellant could recover only the reconditioning costs; it seems to us plain that any other rule would violate the fundamental principal that damages are only to provide indemnity. * * * On a record like this it is quite as possible as not that the Texas Company sold the whole consignment at the market price; in any case it alone had all the information on that subject * * * we know that all these cans were in fact sold, and it is entirely speculative to assume that they sold off price; and certainly it is impossible even to guess for how much off price. * * * "

In Missouri Pacific R. Co. v. H. Rouw Co., 258 F.2d 445 at p. 446 (1958), the court stated as follows quoting from American Jurisprudence, Damages, Section 13:

" 'The fundamental principle of the law of damages being compensation for the injury sustained, the plaintiff in a civil action for damages cannot * * * hold a defendant liable in damages for more than the actual loss which was inflicted by his wrong. * * * The law will not put him in a better position than he would be in had the wrong not been done or the contract not been broken.' "

I am asked in this case to apply a measure of damages which has, in my opinion, no logical relationship to the stipulated facts and which is indefinite and uncertain. From the facts in evidence I cannot thus depart from accepted traditional principles of the law of damages. Accordingly, I find the issues for the defendant and the cause is dismissed at plaintiff's costs.